Supreme Court, U.S.
FILED
JUL 22 1996

No. 95-1886

In the Supreme Court of the United States

OCTOBER TERM, 1995

RICHARD L. FRAZIER, PETITIONER

v.

JAMES B. KING, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals for the Federal Circuit may reverse an arbitrator's decision in order to uphold a federal agency's decision to suspend an employee for sexual harassment and notoriously disgraceful conduct.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A8) is reported at 77 F.3d 1361. The order of the court of appeals granting rehearing (Pet. App. D1-D6) is unpublished, but the decision is noted at 43 F.3d 1485 (Table). The order of the court of appeals denying the petition for review (Pet. App. E1-E5) is unreported. The arbitration decision (Pet. App. B1-B12) and the reconsideration of the arbitration decision (Pet. App. C1-C11) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 1995. Pet. App. A1. The petition for a writ of certiorari was filed on March 18, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Employment in the federal government is governed by the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111. The Act sets forth "an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *United States* v. *Fausto*, 484 U.S. 439, 445 (1988).

The Act provides that an agency may take adverse action against a federal employee (including removal, suspension for more than 14 days, reduction in grade or pay, or a furlough of 30 days or less) "for such cause as will promote the efficiency of the service." 5 U.S.C. 7512, 7513(a). An employee subjected to agency disciplinary action may appeal the agency's decision to the Merit Systems Protection Board (MSPB). 5 U.S.C. 7513(d), 7701. For actions based on unacceptable performance or certain removals, the MSPB must sustain the agency's decision if it is supported by substantial evidence. The MSPB applies a preponderance-of-the-evidence standard in other cases. 5 U.S.C. 7701(c)(1).

The Act also requires that any collective bargaining agreement between a federal agency and a union provide for a grievance procedure and binding arbitration for the resolution of disputes arising under the agreement. 5 U.S.C. 7121(a) and (b). A bargaining unit employee may challenge a disciplinary action by appealing to the MSPB or by filing a grievance. 5 U.S.C. 7121(e)(1). If the employee files a grievance, and the union or the agency invokes binding arbitration (see 5 U.S.C. 7121(b)(1)(C)(iii)), the

arbitrator reviews the agency's decision under the same substantive standards used by the MSPB. 5 U.S.C. 7121(e)(2); see *Cornelius* v. *Nutt*, 472 U.S. 648, 652, 659 (1985).

Upon a determination adverse to the agency by either the MSPB or an arbitrator, the Director of the Office of Personnel Management (OPM) may seek review by the Federal Circuit of a final decision if the Director determines that (1) there was an error "in interpreting a civil service law, rule, or regulation affecting personnel management," and (2) the decision "will have a substantial impact on a civil service law, rule, regulation, or policy directive." 5 U.S.C. 7703(d). Judicial review of arbitral decisions takes place "in the same manner and under the same conditions as if the matter had been decided by the [Merit Systems Protection] Board." 5 U.S.C. 7121(f); see *Cornelius* v. *Nutt*, 472 U.S. at 661 n.16.[1]

2. In February, 1991, the Department of Housing and Urban Development (HUD or agency) proposed to suspend petitioner for 60 days for sexually harassing co-workers and for engaging in "notoriously disgraceful conduct." J.A. 23-35. After determining that the charges were supported by a preponderance of the evidence and that a suspension would promote the efficiency of the service, the agency on October 29, 1991, suspended petitioner for 60 days. Pet. App. A3; J.A. 53-55. Thereafter, petitioner filed a grievance to

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[1] Section 7703(c) sets forth the standard of judicial review to be applied by the Federal Circuit. The court must set aside agency action that is "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence."

challenge the suspension under his union's collective bargaining agreement with the agency. Pet. App. A3.

In his decision, the arbitrator held that petitioner was "not guilty of sexual harassment so that the 60-day suspension was not for just cause." Pet. App. B12. The arbitrator concluded that there was sufficient evidence to show that petitioner had made repeated sexual comments to, and in the presence of, co-workers, and that petitioner had engaged in "no less than notoriously disgraceful conduct." *Id.* at B7-B8. Nevertheless, the arbitrator found the agency lacked just cause for the suspension because petitioner did not realize that his conduct constituted sexual harassment. *Id.* at B8, B11-B12. OPM petitioned the arbitrator to reconsider his decision pursuant to 5 U.S.C. 7703(d) and 7121(f). OPM argued, among other things, that the arbitrator erroneously departed from the "efficiency of the service" standard set forth in 5 U.S.C. 7513(a) by requiring HUD to prove that petitioner acted with wrongful intent and to prove that petitioner had been informed of what conduct constituted sexual harassment. Pet. App. E3. The arbitrator denied OPM's petition for reconsideration and sustained the original arbitration award. *Id.* at C1-C11.

3. The Director of OPM then filed a petition for review of the arbitrator's decision with the Court of Appeals for the Federal Circuit pursuant to 5 U.S.C. 7703(d), which was denied. Pet. App. E1-E5. The court of appeals determined that, although the arbitrator may have erred in rendering his decision, the case did not have the requisite substantial impact upon civil service law to warrant exercise of the court's discretionary review. *Id.* at E4.

OPM petitioned the court of appeals for a rehearing of the court's order denying OPM's petition for review. The court of appeals panel granted rehearing (Pet. App. D1-D6), and reversed the arbitrator's decision. *Id.* at A1-A8. Relying on this Court's decision in *Harris* v. *Forklift Systems, Inc.*, 114 S. Ct. 367 (1993), and its own decision in *King* v. *Hillen*, 21 F.3d 1572 (Fed. Cir. 1994),[2] the court held that the arbitrator had applied the wrong legal standard for sexual harassment in the federal workplace by evaluating the situation from the perspective of the petitioner, rather than the perspective of the persons being harassed. Pet. App. A5-A6. The court found that remand was unwarranted on this issue because the evidence presented to the arbitrator met the requirements for establishing sexual harassment under *Harris* and *Hillen*. *Id.* at A6-A7.

The court of appeals also held that the arbitrator erroneously required the agency to prove an intent to harass. Pet. App. A6. Relying on its decision in *Brook* v. *Corrado*, 999 F.2d 523, 526-527 (Fed. Cir. 1993), the court made clear that, under the "efficiency of the service" standard, 5 U.S.C. 7513(a), an agency must show only that "(1) the employee engaged in misconduct; and (2) there exists a nexus between the misconduct and the efficiency of the service." Pet. App. A6. The court concluded that, although the arbitrator never addressed the "nexus" requirement, there was such a nexus in the present case. The court stated that, when "the employee's misconduct is so egregious that it speaks for itself," a nexus

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[2] The court of appeals had decided *Hillen* after its initial decision denying OPM's petition for review in the present case. Pet. App. D4.

between the misconduct and the efficiency of the service may be presumed. *Id.* at A7. Since the petitioner never rebutted this presumption, the court of appeals reversed the arbitrator's decision. *Id.* at A8.

ARGUMENT

1. The court of appeals correctly reversed the arbitrator's decision because the arbitrator misinterpreted and misapplied the legal standard governing sexual harassment set forth by this Court in *Harris* v. *Forklift Systems, Inc.*, *supra*, and because the arbitrator erred in requiring HUD to prove that petitioner *intended* to harass his victims before HUD could discipline him.

a. It is undisputed that sexual harassment consists of sexual misconduct that would be perceived by a reasonable victim as creating a hostile or abusive working environment, when the victim in fact perceives the environment to be abusive. *Harris* v. *Forklift Systems, Inc.*, 114 S. Ct. at 369-370; see also *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57, 68 (1986). Departing from this standard, the arbitrator excused petitioner's "notoriously disgraceful conduct" because petitioner did not subjectively believe that his actions constituted sexual harassment. Pet. App. B10-B12.[3] The court of appeals correctly held that the arbitrator applied the wrong legal standard in determining whether petitioner had engaged in misconduct.

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[3] The arbitrator incorrectly asked, "How was the conduct perceived by [petitioner]?" and "Did [petitioner] know or should have known that his conduct was sexual harassment?" Pet. App. B8, B11.

b. The court of appeals also correctly found error in the arbitrator's insistence that the agency prove that petitioner had acted with wrongful intent. Pet. App. A6-A7. The CSRA provides that an agency may discipline an employee "for such cause as will promote the efficiency of the service." 5 U.S.C. 7513(a); Pet. App. A6. The agency is not required to prove that the employee's misconduct resulted from a wrongful intent. *Colon* v. *Department of the Navy*, 58 M.S.P.R. 190, 197 (1993) (disorderly conduct); *McMillan* v. *United States Postal Service*, 48 M.S.P.R. 590, 593 (1991) (assault); *Murray* v. *Department of Army*, 40 M.S.P.R. 250, 255-256 (1989) (disturbance in the workplace).

2. Despite petitioner's suggestions to the contrary (Pet. 11-12), an agency's prior tolerance of the employee's misconduct does not prevent the agency from taking adverse action to discipline such misconduct. Federal agencies are obliged to discipline employees for conduct that constitutes sexual harassment. *Intlekofer* v. *Turnage*, 973 F.2d 773, 779-780 (9th Cir. 1992). In this case, moreover, petitioner had signed a statement acknowledging that he had received and read OPM's definition of sexual harassment and OPM's policy statement prohibiting sexual harassment in the workplace. Pet. App. A3.

3. Petitioner does not question that the Federal Circuit properly reviewed the decision of the arbitrator under Section 7703(d) because of the decision's impact on civil service law. In this case, the arbitrator's decision conflicts with the CSRA, and departs dramatically from precedent concerning the government's burden of proof in personnel cases. Moreover, by requiring federal agencies to prove that employees perceived their misconduct to be prohibited

by agency policy, and that they intended to violate agency policy, the arbitrator's decision infused legal elements not required by the CSRA. If left uncorrected, the arbitrator's decision would significantly curtail the government's ability to discipline its employees for misconduct, a result clearly contrary to Congress's purpose in enacting the CSRA.

4. The Federal Circuit's decision in this case is not inconsistent with the four cases cited by petitioner that involve review of arbitrators' awards concerning sexual harassment in the private sector. Pet. App. 9, 11-12. In each of those cases, which did not involve federal employment, the court noted the deference due to arbitral awards, and reviewed whether the award violated public policy.[4] The cases

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[4] In *Stroehmann Bakeries* v. *Local 776, International Brotherhood of Teamsters*, 969 F.2d 1436, 1441-1442, cert. denied, 506 U.S. 1022 (1992), the Third Circuit reversed an arbitration award, and held that "an award which fully reinstates an employee accused of sexual harassment without a determination that the harassment did not occur, violates * * * the well-defined and dominant public policy concerning sexual harassment in the workplace." Similarly, in *Newsday* v. *Long Island Typographical Union*, 915 F.2d 840, 843-845 (1990), cert. denied, 499 U.S. 922 (1991), the Second Circuit overturned an arbitration award that reinstated an employee who had engaged in sexual harassment. The court found that the return of a known sexual harasser to the workplace would perpetuate a hostile work environment and inhibit the employer from further preventing sexual harassment.

The other two decisions cited by petitioner deferred to an arbitrator (Pet. 11), but involved only a question of the severity of the penalty to be imposed. In *Communication Workers* v. *Southeastern Elec. Coop.*, 882 F.2d 467, 470 (1989), the Tenth Circuit refused to vacate an arbitrator's decision, reinstating an employee discharged for sexual harassment, because, among other things, the arbitrator imposed another type of discipline

followed this Court's decision in *United Paperworkers Int'l Union* v. *Misco, Inc.*, 484 U.S. 29, 37 (1987), which stated that the purpose underlying the Labor Management Relations Act, 29 U.S.C. 173, (that private disputes be settled without the intervention of government) dictated the finality of arbitral decisions unless they violate clear public policy. See also *W. R. Grace & Co.* v. *Rubber Workers*, 461 U.S. 757, 764-766 (1983). Relying on *Misco* and *W. R. Grace & Co.*, petitioner contends that, "if the award is based essentially on the contract and the parties' submission, the court is bound to enforce it." Pet. 10. This argument ignores the special purpose of the CSRA to ensure uniform application of the federal civil service laws, regardless of whether an arbitrator or the MSPB is reviewing agency action. 5 U.S.C. 7121(e)(2) and (f); see also *United States* v. *Fausto*, 484 U.S. at 451 (noting the importance of the Federal Circuit's role under Section 7703 to provide consistent interpretation of the civil service laws).

Cornelius v. *Nutt*, *supra*, lays to rest any question whether a reviewing court must defer to an arbitrator's decision that is legally erroneous under the CSRA. In *Cornelius*, this Court declined to defer to an arbitrator's interpretation of the "harmful error" rule in Section 7701(c)(2)(A) of the CSRA, an interpretation that had differed from that of the MSPB.

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on the employee. Similarly, in *Chrysler Motors* v. *International Union*, 959 F.2d 685, 689, cert. denied, 506 U.S. 908 (1992), the Seventh Circuit affirmed an arbitration award reinstating an employee who had been discharged for sexual harassment, holding that "a 30-day suspension rather than a discharge was an adequate sanction."

472 U.S. at 660-662.[5] Differing interpretations of the CSRA would have resulted in "the very inconsistency and forum shopping that Congress sought to avoid." *Id.* at 662. Similarly, the Court noted that Section 7121(f), which provides that arbitral decisions are subject to judicial review "in the same manner and under the same conditions as if the matter had been decided by the [Merit Systems Protection] Board," ensures uniformity between MSPB and arbitral decisions. 472 U.S. at 661 n.16.

The Federal Circuit has acknowledged in decisions under the CSRA traditional labor policy deference to arbitral awards. *Devine* v. *Levin*, 739 F.2d 1567, 1570 (Fed. Cir. 1983). The Federal Circuit, however, has not hesitated to exercise its discretion to review an arbitration award that, like the award in the instant case, conflicts with federal law. See, *e.g.*, *Horner* v. *Bell*, 825 F.2d 382, 383-385 (Fed. Cir. 1987) (arbitration decision misinterpreted collective bargaining agreement and violated management rights provision of CSRA); *Devine* v. *Levin*, 739 F.2d at 1569-1570 (arbitrator lacked jurisdiction over supervisor).[6]

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[5] Section 7701(c)(2)(A) requires an employee to show "harmful error in the application of the agency's procedures in arriving at [the agency's] decision." The Board had interpreted the rule to require a showing of prejudice to the individual employee, whereas the arbitrator had interpreted the rule to allow a showing of prejudice to the union because the agency had violated the collective bargaining agreement. This Court rejected the view that the agency should be penalized for violating provisions of the collective bargaining agreement when the procedural mistake had no effect on the agency's decision. 472 U.S. at 662.

[6] The proposition that some deference is due arbitral awards under the CSRA arose from *Devine* v. *White*, 697 F.2d 421 (1983), a case decided by the District of Columbia Circuit

The arbitration cases from the private sector cited by petitioner are therefore inapposite. None of them arose under the CSRA. As a result, none invoked the provisions of the CSRA that allow judicial review of arbitral decisions "in the same manner and under the same conditions" as if the court were reviewing a decision by the MSPB. 5 U.S.C. 7121(f). Under the CSRA, the court need not find that the arbitrator's award violated public policy in order to review the decision for compliance with the civil service law.[7] Here, the arbitrator applied the wrong legal standard for determining the existence of sexual harassment and also departed from the "efficiency of the service" standard under Section 7513. The Federal Circuit correctly reversed the arbitrator's decision.

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and in part overruled by this Court in *Cornelius* v. *Nutt*, 472 U.S. at 656 n.7. *White* held that, when considering OPM petitions for review, the court should balance the need for review against the "damage to arbitration inherent in the appellate process." 697 F.2d at 440. Even if a balance of factors were required in this case, the court of appeals correctly took jurisdiction over the arbitrator's decision in view of the erroneous legal standard used and the importance of the case to agencies attempting to end sexual harassment.

[7] Undermining an agency's ability to eradicate sexual harassment in the workplace would, in all events, clearly contravene public policy.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1996